

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DWAYNE SMITH,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 193537
Recorder's Court
LC No. 95-005355

Before: Saad, P.J., and O'Connell and M.J. Matuzak*, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree premeditated murder, MCL 750.316; MSA 28.548, two counts of first-degree felony murder, MCL 750.316; MSA 28.548, one count of armed robbery, MCL 750.529; MSA 28.797, four counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appeals as of right, and we affirm.

I

Defendant argues that he was denied effective assistance of counsel because his trial counsel failed to investigate and present alibi witnesses. Defendant failed to move for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel. Therefore, this Court's review is limited to mistakes apparent on the record. *People v McMillian*, 213 Mich App 134, 141; 539 NW2d 553 (1995). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant. *Id.*

A defendant is entitled to have his counsel prepare, investigate and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "At a posttrial

* Circuit judge, sitting on the Court of Appeals by assignment.

evidentiary hearing, however, a defendant must show that he made a good-faith effort to avail himself of this right and that the defense of which he was deprived was substantial.” *Id.* A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

Here, defendant testified at trial that during the time period in which the crimes were committed he stopped at an after hours establishment for a drink. Defendant contends on appeal that there were witnesses at this establishment who could testify to his whereabouts. However, there is nothing in the record showing what the proposed alibi witnesses’ testimony would have been had they been permitted to testify and whether they would have, in fact, provided an alibi for defendant. Thus, on this record, there is no showing that defendant was denied effective assistance of counsel.

II

Defendant next contends that, because the three eyewitness who identified him were allegedly limited in their ability to perceive their assailant due to (among other things) intoxication, there was insufficient evidence to convict him of the charged crimes. Whether the eyewitnesses were in a position to perceive defendant as their assailant is not an issue of sufficiency, but rather, credibility. *People v Boynton*, 46 Mich App 748, 749; 208 NW2d 523 (1973). Defendant’s sufficiency challenge on this basis cannot be maintained.

III

Next, defendant argues that there was insufficient evidence for a reasonable jury to find all of the elements of first-degree felony murder. We disagree. Statutory felony murder is governed by MCL 750.316; MSA 28.548, says that:

(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

* * *

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substances offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping.

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993).

Here, the robbery of the victims formed the basis of the felony murder charge. The elements of armed robbery are: (1) assault, (2) felonious taking of property from the victim's person or presence, and (3) defendant being armed with a weapon described in the statute. MCL 750.529; MSA 28.797; *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). Defendant contends that the evidence was insufficient for a reasonable trier of fact to conclude that property was taken from the victims.

Contrary to defendant's position, there was ample evidence to support the jury's findings that either property was taken or that there was an attempt to take property from six victims, including the two that died. Complainant James testified that after the shooting he heard defendant say to his companion, "Hit all they [sic] pockets." James testified that he then felt a hand in his right pocket where he had more than two hundred dollars. Although the only thing complainant Raynard recalls after going to sleep that evening was waking up in the hospital weeks later recovering from gunshot wounds, he did testify that when he went to sleep that night there was four or five hundred dollars and drugs in his pocket and that these things were gone when he awoke in the hospital. Complainant Rodney testified that after he was shot he felt either defendant or defendant's accomplice go through his pockets and take his money. From this evidence, a rational trier of fact could reasonably infer that the two victims were killed during the commission of a robbery perpetrated by defendant and his accomplice. Therefore, viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented to support defendant's convictions.

IV

Defendant also says that he is entitled to a new trial as a result of the trial court's admission of hearsay. Again, we disagree.

Three witnesses testified that two of the victims told them that defendant had committed the shootings. The trial court did not abuse its discretion when it admitted this testimony because a proper foundation was laid that permitted the testimony to be admitted under the excited utterance exception to the hearsay rule. MRE 803(2). Complainants, James and Rodney, told the witnesses the identity of their assailants while they were still under the influence of an overwhelming emotional condition brought on by the stress of being the victims of a shooting spree. Put another way, the statements by James and Rodney were made before there had been time to contrive and misrepresent. Consequently, the testimony was properly admitted under the excited utterance exception. *People v Kowalak (On Remand)*, 215 Mich App 554, 557-558; 546 NW2d 681 (1996). Because this evidence was properly admitted, we find no merit in defendant's argument that the prosecutor improperly elicited the hearsay testimony.

V

Finally, we hold that the retrial of defendant following the trial court's mid-trial declaration of a mistrial did not violate the Double Jeopardy Clause. US Const, Am V; Const 1963, art 1, § 15. When a defendant exercises the right to trial by jury, jeopardy generally attaches at the time the jury is selected and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). "If the trial is concluded

prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity.” *Id.* Any doubt regarding the existence of manifest necessity should be resolved in favor of the defendant. *People v Little*, 180 Mich App 19, 23; 446 NW2d 566 (1989). The trial court must exercise the power to declare a mistrial with great caution and employ less drastic alternatives which would be revealed by the scrupulous exercise of judicial discretion. *Id.* After a review of the record, we conclude that the trial court declared a mistrial out of manifest necessity and therefore, defendant’s retrial did not violate the Double Jeopardy Clause.

In *People v Dry Land Marina*, 175 Mich App 322, 325-326; 437 NW2d 391 (1989), *cert denied*, 495 US 931, 110 S Ct 2170, 109 LE2d 499 (1990), we concluded that it was proper for a trial judge to discharge an ailing juror and replace the juror with an alternate after the jury had begun deliberations. Here, the trial court had no reasonable alternative but to relieve the discharged juror of her obligations in light of the recommendations of her physician. Thus, removing the juror was not an abuse of discretion. Nor did the trial court abuse its discretion in thereafter declaring a mistrial. Two of the original fourteen jurors had been lost to attrition the day before and defendant, as was within his rights, refused to be tried by fewer than twelve jurors. Under these circumstances, the trial court had no other available alternatives but to declare a mistrial. Retrial of defendant was therefore permissible (and not violative of the Double Jeopardy Clause) because the declaration of a mistrial was manifestly necessary.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O’Connell

/s/ Michael J. Matuzak

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).